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**Subcommittee on Commerce, Manufacturing and Trade and the Subcommittee on Health  
House Energy and Commerce Committee**

**Hearing on  
Food Marketing: Can “Voluntary” Government Restrictions Improve Children’s Health?**

**October 12, 2011**

The Association of National Advertisers (ANA) appreciates the opportunity to present our serious concerns about the proposals for marketing food to children that were announced by the Interagency Working Group (IWG) on April 28<sup>th</sup> 2011.

ANA represents more than 400 major global and national marketers, including companies from the food, beverage and restaurant industries that would be severely adversely impacted if these proposals are finalized.

We commend the Subcommittees for holding this hearing. Your Subcommittees have unique experience about the health, nutrition and marketing and advertising issues that are fundamental to the understanding of the current discussion about the IWG guidelines.

We also commend Chairman Upton and the other members of the House Energy and Commerce Committee who wrote the September 12, 2011 letter to IWG requesting answers to

ten key specific questions about their proposal. Those questions go directly to the fundamental defects with the IWG proposal. No report should come forward to the Congress unless and until these questions are answered. In addition, the IWG should not issue any report until they provide specific answers to the request of the Congress in the FY 2009 Omnibus Appropriations Act that specifically asked the IWG to provide a “study” and “recommendations” including “the role of consumption of nutrients, ingredients and *food in preventing or promoting the development of obesity among such children.*”(emphasis added)

## **Introduction**

The marketing and media communities recognize that childhood obesity is a serious national challenge. In the decade since the U.S. Surgeon General’s call to action, our industries have voluntarily developed broad ranging and multi-billion dollar efforts to help respond to this threat.

The FY2009 Omnibus Appropriations Act directed the IWG to conduct a study of food marketed to children aged 17 and younger and to make recommendations to Congress for standards for marketing food to these children. Instead of conducting a study, the IWG has released a radical, unprecedented proposal calling for massive changes impacting broad sectors of our economy, with absolutely no cost/benefit analysis.

While falsely labeled as “voluntary,” this proposal is clearly “backdoor regulation” by four extremely powerful government agencies that seek to accomplish a goal indirectly that could

not be reached through normal rulemaking procedures. By using the coercive force of government agencies to suppress truthful advertising about a broad range of healthy, legal products for every segment of the public, the proposal clearly violates the First Amendment rights of both marketers and consumers. Worst of all, there is absolutely no discussion or proof that these massive changes in product formulation or marketing practices, which if carried out would cost the food, restaurant and media communities multi-billions of dollars, would actually have any direct or material impact on reducing childhood obesity rates in the United States.

As already noted, this failure is extremely significant. It demonstrates an unwillingness to respond to the explicit charge of the Congress to the IWG to carry out a **“study”** and provide **“evidence concerning the role of nutrients, ingredients, and foods in preventing or promoting the development of obesity...among children (IWG Report, 2).”**

We appreciate the recent statement from the IWG in the September 27, 2011 letter to Chairman Upton that the Group “anticipates making significant changes to both the marketing and nutrition principles as it develops final recommendations as required by the Congress.”

As the saying goes, and which is particularly relevant to a discussion of the regulation of nutrition standards and food, beverage and restaurant advertising, the proof is in the pudding. We believe the IWG should formally withdraw this seriously flawed proposal and work with the business community and other interested groups to develop real solutions to the childhood obesity challenge.

### **The Ad Community Has Responded to the Childhood Obesity Challenge**

No other group or segment of our society has done more to respond to the obesity challenge than the food, beverage, restaurant, media and advertising communities. Here are just some of the highlights of how the marketing and media communities have responded proactively to the childhood obesity challenge:

***Product Changes:*** Food and beverage and restaurant companies, in just the last several years, have responded through more than 20,000 product reformulations and new menu options, directed to consumer concerns about calories and healthy diets. Parents have more choices in every aisle of the supermarket than ever before. Almost every restaurant menu has healthier options and quick service restaurants are now among the largest sellers of low calorie salads, yogurt and fruit.

***Partnerships:*** Many food companies and media companies have launched individual partnerships with schools, YMCA's and other community groups to promote better diets and more physical activity. One food manufacturer, for example, has awarded \$700,000 in grants to community YMCA's, hospitals for children, and 4-H programs to sponsor healthy lifestyle programs. Another is offering fifty \$10,000 grants a year to help communities sponsor programs to promote balanced diets and physically active lifestyles. Yet another company is providing pedometers in schools to encourage kids to walk more. These programs exemplify

the multitude of similar efforts across the spectrum of the food, beverage, and restaurant communities.

***The Healthy Weight Commitment Foundation:*** In 2009, industry launched the Healthy Weight Commitment Foundation, a national CEO-led group designed to help reduce childhood obesity. The coalition includes retailers, food and beverage companies, restaurants, sporting goods companies, professional sports organizations and more. The Foundation made a pledge in 2010 that its member companies will collectively cut 1.5 trillion calories from their products by the end of 2015. Companies in the coalition plan to accomplish this goal by offering low calorie options of products, changing product recipes to allow for lower calorie counts, and reducing portion sizes of single-serve products. The Foundation focuses on three critical areas – the marketplace, the workplace and schools. More information is available at: [www.healthyweightcommit.org](http://www.healthyweightcommit.org).

***The Advertising Council:*** The Ad Council has partnered with the Department of Health and Human Services (HHS) since 2004 on obesity prevention programs, including the “Small Steps” campaign. In 2009, HHS and The Ad Council launched a new series of public service ads featuring characters from the film, “Where the Wild Things Are.” Since the launch of the “Small Steps” campaign, there have been almost 12 million visits to the HHS website, [www.smallstep.gov](http://www.smallstep.gov).

Last year, The Ad Council was chosen by First Lady Michelle Obama to produce a series of public service ads as part of her “Let’s Move!” initiative. The ads, featuring Looney Tunes’ characters, professional athletes and popular *Scholastic* characters Maya and Miguel, encourage children to get more physically active and eat healthy diets.

According to tracking studies conducted by The Ad Council, with the support of the Robert Wood Johnson Foundation, the campaigns are having a significant impact on attitudes and behaviors. Significant numbers of respondents report that their eating habits and activity levels are much healthier.

***Media companies (broadcast, cable, online, print and outdoor) have donated almost half a billion dollars to this effort.*** Millions of dollars of time and talent have also been donated by marketers and advertising agencies to develop these campaigns. More information is available at: [www.adcouncil.org](http://www.adcouncil.org).

***Self-Regulatory Programs:*** Beginning in 2005, the marketing community conducted a comprehensive review of the guidelines of the Children’s Advertising Review Unit (CARU), the self-regulatory organization of the advertising community which was designed to ensure that children’s advertising is truthful and follows stringent industry-developed standards. That effort, led by Jodie Bernstein, former Director of the FTC’s Bureau of Competition, updated the guides to address concerns about ads in new media and interactive games.

It also led to the creation in November 2006 of the Children's Food and Beverage Advertising Initiative (CFBAI). Through the voluntary commitment of the 17 member companies, the landscape of children's advertising is significantly different than it was several years ago.

Major quick service restaurants now advertise kid's meals with apple products and low fat milk. Other participating food manufacturers have significantly lowered sodium or sugar content of the products they advertise to children and some major confectionary and soft drink manufacturers have voluntarily committed not to advertise on child directed media. The CFBAI reports that over 80% of the CFBAI member products now being advertised on child directed media are a good source of nutrients that children do not get enough of in their diets - including calcium and fiber. As of 2010, all participating companies are required to direct advertising toward children under the age of 12 to products that are healthier. The seventeen participating companies carry out more than 80% of all food, beverage, and restaurant advertisements directed to children under the age of 12 in the United States.

These are real, significant and voluntary efforts undertaken to improve the mix of food advertised to children-- and that progress is continuing. On July 14<sup>th</sup>, CFBAI announced that the 17 participating companies will follow uniform nutrition criteria for the foods advertised to children. The new criteria take into account food science, U.S. dietary guidelines and the real-world challenges of changing recipes of well-known foods. These uniform nutrition criteria represent another huge step forward in voluntary efforts to improve child-directed advertising.

More information about the CFBAI is available at [www.bbb.org/us/children-food-beverage-advertising-initiative](http://www.bbb.org/us/children-food-beverage-advertising-initiative).

As discussed in more detail below, ANA and the Grocery Manufacturers Association (GMA) have conducted several studies of Nielsen Media Research data to quantify food advertising expenditures over a period of years. The latest survey, which was released on April 28<sup>th</sup>, found that the average number of food and beverage ads that children aged 2 to 11 viewed on children's programming fell by 50% between 2004 and 2011. There was also a dramatic change in the type of food products that were advertised.

Interestingly, despite the enormous impact of all of these changes on food, beverage, and restaurant marketing, the IWG barely acknowledges any of these developments.

In fact, despite carrying out a more than 2 year study the IWG in its latest preliminary report released this April continues to use totally superannuated Nielsen data from 2006. This scientifically myopic approach, when up to date data is readily available, certainly is not what the Congress should expect from the regulatory agencies with subject matter responsibility for these critical areas.

### **The Proposed Nutrition Standards Are Radical and Unreasonable**

The IWG, in effect, has declared war on cereals, peanut butter and jelly sandwiches, tomato soup, 2% milk, and thousands of other healthy foods and beverages as well as many restaurant

menu items. These products are legal to purchase. None of them have restricted availabilities due to age requirements.

Ironically, many of these same foods that “fail” the IWG standards meet the FDA’s definition of “healthy” and bear FDA-authorized health claims. They satisfy the USDA’s standards for the Women, Infant, Children (WIC) food assistance program. The 2010 U.S. Dietary Guidelines encourage families to consume these products and many families purchase them using federal funds through the SNAP (food stamp) program. It would seem that products that meet the federal government’s stringent criteria for being labeled “healthy” would be considered candidates for increased advertising, rather than being relegated to those categories that the IWG is asserting should not be advertised to anyone under 18.

Yet, this proposal attempts to utilize the enormous regulatory authority of the IWG agencies over the growing, manufacturing, packaging, labeling and marketing arenas to pressure the food, beverage, restaurant, and media communities to end the advertising of all of these existing products to anyone less than 18 years of age.

The IWG proposal goes far beyond any nutrition or marketing standards ever considered by any government agency. They represent an extraordinary effort by the government to completely re-engineer the American diet. This is not industry hype or overstatement but is tacitly acknowledged in the IWG report. Indeed, the IWG report specifically states that it “recognizes that, if the proposed nutrition principles were fully implemented by industry as

proposed, a large percentage of food products currently in the marketplace would not meet the principles.” (*IWG Report*, page 5)

According to the NPD Group, Inc., out of the 100 most commonly consumed foods and beverages in America, only 12 would meet the IWG’s proposed nutrition standards. Among the “top 100” of these foods that would not meet those standards are: most cereals, both hot and cold, most salads, many bottled waters, canned green beans, peas and corn, whole wheat bread, oatmeal, most soups, reduced fat yogurt, rice, 2% milk, and numerous others. Can these types of foods that the IWG would ban from advertising to anyone under 18 be described with a straight face as “junk food?” If so, why are many of them being promoted as “healthy” under government standards or being promoted under existing food and nutrition programs?

The only foods within the “Top 100” list that would meet the IWG’s nutrition standards are: bananas, grapes, broccoli, a few other similar fresh fruits and vegetables, apple sauce with no added sugar, and some frozen vegetables. These are certainly healthy foods, but in and of themselves, they hardly constitute an overall balanced and healthy diet for children or adults.

We do not believe the government has either the legal authority or responsibility to define “good foods” and “bad foods” in such an extreme and rigid manner and thereby adversely target broad categories of healthy foods and beverages for proposed severe marketing and advertising restrictions. Government efforts to ban the advertising of such broad categories of foods clearly would be unconstitutional.

### **Childproofing the Marketplace**

The IWG proposal also contains an extraordinarily broad definition of marketing, listing 20 specific categories, including all major media. Packaging, point-of-purchase displays, sponsorship of events and sports teams, word-of-mouth advertising, and even philanthropic activities tied to branding opportunities are included. In fact, the last category listed by the IWG proposal is a “catch-all other” category (*IWG Report*, 18).

Does anyone seriously believe that “voluntarily” removing corporate icons such as “Tony the Tiger” or making “Snap, Crackle and Pop” Public Enemy Number 1 or removing pictures of well-known athletes from cereal boxes would materially reduce childhood obesity? Should support of Little League teams (a major source of physical activity for youth) be banned for branded food and beverage products? Because of the coverage of word-of-mouth advertising under the IWG proposal, even the sale of Girl Scout Cookies by Girl Scouts themselves could be challenged under the IWG proposal.

In addition, this proposal could have the effect of calling on food companies to “voluntarily” end sponsorship of Olympic athletes and NASCAR teams if 20% of the audience viewing such marketing is between 12 to 17 years old. A number of food companies and retailers are corporate sponsors of the Children’s Miracle Hospital Network. By stigmatizing these types of sponsorships, the IWG proposal could have serious impacts on a broad range of non-profit groups across the country, large and small.

We believe the all-inclusive approach of the marketing definition in regard to advertising and marketing “directed to children” in the IWG proposal is overly broad and could encompass preponderantly parent-directed or family ad campaigns.

Advertising is considered “child-directed” under the IWG definitions if: various audience thresholds are reached (30% for children 2-11 and 20% for adolescents age 12-17); or the marketing plan indicated an intent to reach kids; or if the ad includes “child-directed features” such as animated or licensed characters, celebrity endorsers popular with children, or the ad promotes child-oriented products or media (*IWG Report*, 18).

Thus, virtually any ad that shows a child or mentions children could get caught up in the FTC’s sweeping definition of child-directed marketing. We estimate utilizing Nielsen data that over 1,700 programs on broadcast TV and cable will be swept into this inadequately differentiated net. Such an approach, which captures marketing to audiences that overwhelmingly consist of adults as well as children or teens, is clearly excessively broad and raises extremely serious First Amendment issues.

### **Infantilizing Teenagers**

We are also very concerned about the IWG’s proposal to impose special protections for all children under 18 years of age. Advertisers have long believed that children under 12 years old deserve special protection and consideration. We understand that children are not miniature

adults and that advertising material that might be appropriate for adults might be inappropriate or even deceptive for children. It is for this reason that we created the tough self regulatory programs under the Children's Advertising Review Unit (CARU) and the Children's Food and Beverage Advertising Initiative (CFBAI) to provide special protections for all children under 12.

It takes an analytical contortionist, however, to accept the view that teenagers are incapable of handling various types of food advertising but are ready to take on other major societal responsibilities. Many 17 year olds are allowed to drive by themselves and stand at the threshold of being allowed to vote, to marry and to go into the military. When we urge treating a 17 year old like a seven year old with regard to advertising, how can you stop there in regard to speech censorship? It is just not possible to place adolescents from 12 to 17 in hermetically sealed containers until they somehow emerge magically mature at the age of 18.

It is also important to remember that children have independent First Amendment rights. In *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), Judge Richard Posner described this critical reality: "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."

The IWG proposal also would seriously undermine funding for thousands of television shows. While the impact would be most severe on children's programming, the extremely broad scope of the definitions of the IWG proposal could affect many other adult-oriented programs,

ranging from *American Idol* to the Super Bowl and college sports. The IWG report itself admits that this proposal would have substantial impacts on adult programming (*IWG Report*, 17).

The IWG, while admitting that their proposals would “not take into account developmental difference between adolescents and younger children” (*Ibid*, 17), suggest that this problem might be eliminated or mitigated by “limiting the scope to in-school marketing and social media, such as the Internet, digital, word-of-mouth, and viral marketing.” (*Ibid*, 17) The IWG admitted that they were “unaware of studies concluding whether or not such marketing is any more successful in affecting adolescents’ food choices than traditional media.” (*Ibid*, 17) Nevertheless, the IWG proposal suggests that they are seriously considering upholding these teenage-directed restrictions in the new media arena.

Under these circumstances, where the regulatory agencies themselves admit a complete lack of evidence, proposing limits to kids in new media is totally unjustified, and if enforced by the government, almost certainly unconstitutional.

### **Voluntary By Demand**

The Working Group and other critics have recently argued that the proposed IWG principles are merely “voluntary” and do not call for government regulation of food marketing. Therefore, these spokesmen seem to imply that industry should relax and stop worrying. However, we believe that the government, particularly powerful groups like the four major organizations that make up the Working Group, should never make formal proposals, whether mandatory or

voluntary, that if acceded to would cause, as here, enormous economic damage without demonstrable measurable benefits.

In addition, there is every reason to believe that the IWG when it launched their proposals had no intention that their nutrition and marketing standards be easily evaded or ignored. The IWG proposals are the product of over two years of development. They include highly technical, rigid and specific performance requirements that are so complex that only nutrition experts can understand their full impact. They also become far more restrictive over time. The four agencies that promulgated these proposals have extraordinary regulatory authority over the day-to-day operations of the food industry, including the power to order product recalls and the ability to subpoena specific information from marketers, as the FTC has repeatedly done.

The agencies have publicly indicated that noncompliance with these “voluntary” principles could trigger mandatory regulation. At the public forum on December 15, 2009, where the preliminary IWG proposal was first released, David Vladeck, Director of the FTC’s Bureau of Consumer Protection, stated: “We would not be talking about government regulation if industry self-regulation had made greater strides” and further noted that if industry does not “make great strides in limiting children-directed marketing” in compliance with this proposal, Congress is likely to “decide for all of us what additional steps are required.” (*Sizing Up Food Marketing and Childhood Obesity*, <http://www.ftc.gov/bcp/workshops/sizingup/index.shtml>, 261, 263).

On May 11, 2010, the White House Task Force on Childhood Obesity issued a report on “Solving the Problem of Childhood Obesity Within a Generation.” While the report acknowledged the need for comprehensive, society-wide steps to address childhood obesity, it called for industry to do even more to change the “food marketing environment.” The report stated that if voluntary efforts to limit the marketing of “less healthy foods and beverages” do not yield substantial results, the Federal Communications Commission (FCC) should consider changes in the regulations concerning advertising during children’s programming. Another recommendation proposed involving the FCC in developing a system of ratings for TV commercials that would enable parents to block “unhealthy food and beverage advertising from all programming.”

Furthermore, interest groups have organized major lobbying efforts to demand that the IWG proposals be upheld as “reasonable” and “scientifically based.” Does anyone really believe that all these various types of major effort would be launched if the groups involved did not believe that the proposals would impose substantial coercive pressure?

Clearly the IWG proposals have been developed as the standard to assure effective industry self-regulation. And the FCC proposals within the White House Task Force Report have clearly signaled that these standards should be used to penalize industry if a failure to implement effective self-regulation occurs.

In fact, the FCC, at least in regard to broadcasters, does not need to develop new regulations or restrictions to attempt to enforce these IWG proposals. The IWG, by extensively detailing what should be the government's view of the appropriate and healthy way to advertise food and beverage products to those under the age of 18, has developed a clear regulatory enforcement map for the FCC. Under the Federal Communications Act, all broadcasters receive their licenses based on their operating in the "public interest." As licenses come up for review, however, it is almost certain that the FCC and advocacy groups will challenge the licenses if the broadcasters have failed to block any advertising for foods, beverages, or restaurants that fails to conform to the clear strictures of the IWG. They are closely premised on the claim that this approach will further the health and well-being of children.

With such a drumbeat of strong threats of new laws and regulations to restrict food, beverage, and restaurant advertising, no one should be misled by the "voluntary" label.

In fact, two of this country's leading constitutional scholars, Martin Redish and Kathleen Sullivan, have analyzed the IWG proposal and found it to be a thinly disguised attempt at backdoor regulation. Martin Redish, who is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law and a noted First Amendment expert, has written a "White Paper" discussing the serious constitutional implications of the "voluntary" proposal of the IWG. That paper, entitled "Childhood Obesity, Advertising and the First Amendment," is available at <http://www.ana.net/getfile/16519>.

Reviewing the coercive effect of the IWG proposal and its impact on commercial speech, Professor Redish stated: “Simply as a matter of common sense it is all but inconceivable that the federal government would incur the burdens and expense involved in establishing the Interagency Working Group and preparing the advertising regulations only to have the food industry summarily ignore them (*Redish*, 5).” Professor Redish then concludes: “The voluntary nature of the regulations is therefore appropriately deemed to be nothing more than a precursor to coercive enforcement in the event that the industry fails to comply (*Ibid*, 5-6).”

At a recent public forum, Professor Redish gave a less legalistic example of the power of a “voluntary” request: a boss informs all of his employees that his daughter is selling Girl Scout cookies and he just “hopes” they will all voluntarily buy some for this highly worthy cause. This is the same type of volunteerism that the IWG proposal offers the business community.

Professor Redish’s “White Paper” also notes that even a proposed “voluntary” government action can create a serious and imminent First Amendment threat. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court invalidated the actions of government officials who unilaterally notified publishers that certain books were obscene for children under age 18 and thereby coerced the publishers into removing the books from circulation. According to Professor Redish, the Supreme Court in *Bantam Books* “squarely rejected the government’s argument that mere agency exhortations, unaccompanied by ‘formal legal sanctions,’ did not violate the First Amendment where the targets of the governmental statements inevitably felt compelled to alter their speech activities. *Bantam Books* is consistent with a long line of cases

holding that the government cannot use its regulatory authority and police power as a veiled threat to discourage speech (*Ibid*, 6-7).”

Kathleen Sullivan, the Stanley Morrison Professor of Law and former Dean of the Stanford Law School, wrote in a statement to the IWG: “The food marketing guidelines cannot escape full First Amendment analysis merely because they are styled as ‘voluntary.’ A set of guidelines used by a group of regulatory agencies with enormous regulatory and investigatory power over the food and media industries that are subject to those guidelines is the functional equivalent of government action, and companies may not be required to surrender free speech protections in exchange for the ‘benefit’ that government refrains from regulating them directly.”

Professor Sullivan further notes that “[g]overnment action undertaken with the purpose and predictable effect of curbing truthful speech is de facto regulation and triggers the same First Amendment concerns raised by overt regulation, “ and that the Supreme Court has long held that such efforts are unconstitutional “even where the mode of censorship is informal and even where the acceptance of the speech restrictive conditions is nominally voluntary.”

Thus, even the so-called “voluntary” proposed marketing standards of the IWG, which seek to suppress speech about healthy food products, can give rise to serious First Amendment issues. While lawyers can debate whether an immediate injunction against the IWG proposals once finalized would succeed, it would stretch credulity to argue that these proposals were not

designed and intended to impose as much pressure as possible on the food, beverage, restaurant, and media communities. With these proposals having the potential for such wide-ranging and severe economic damage to the specific groups targeted and to the economy as a whole, the IWG proposal should not be allowed to be imposed and should be withdrawn.

### **The Proposal Should be Subjected to Regulatory Review**

This proposal clearly violates the spirit of the Executive Order on Improving Regulation and Regulatory Review which was signed by President Obama on January 18, 2011. That Order states that federal regulations must promote economic growth, innovation, competitiveness and job creation; they must be based on the best available science; they must include a cost/benefit analysis and use the best, most innovative and least burdensome tools for achieving regulatory ends; and they must measure and seek to improve the actual results of regulatory requirements.

The IWG proposal does not include any of this type of analysis and clearly fails all of these principles. It calls for sweeping changes in the way food products are produced and marketed which would have multi-billion-dollar implications for jobs and important sectors of our economy – with absolutely no cost/benefit analysis.

A new study conducted by IHS Consulting, for example, a highly regarded economic think tank, utilizing a macro-economic model of the U.S. economy that was developed by Dr. Lawrence R. Klein, who was awarded the Nobel Prize in economics for his work in developing this model,

demonstrates that if the proposals were enacted, food and beverage advertising expenditures, even by highly conservative estimates, would decrease by 20%. This, in turn, would lead to a decrease in sales by food and beverage producers of \$30 billion and to a loss of as many as 74,000 jobs in just one year. Over a four year period, there would be a cumulative sales loss of \$152 billion and a decrease of roughly 378,000 jobs. (<http://www.ana.net/getfile/16535>) This type of economic and job loss would clearly send serious shockwaves into our economy.

The disturbing fact is that the more successful the IWG proposals are in suppressing food, beverage, and restaurant advertising, the greater will be the economic damage to jobs and numerous businesses throughout the United States. How can the government justify promulgating this type of proposal that could have these types of adverse effects?

Most importantly, there is absolutely no discussion about how this proposal, if fully implemented, would actually reduce childhood obesity rates. The fact is, as discussed in detail below, it simply will not work.

We also believe that the IWG proposal violates the National Nutrition Monitoring and Related Research Act of 1990 (NNMRRRA). That Act provides that “[a]ny federal agency that proposes to issue any dietary guidance for the general population or identified population subgroups shall submit the text of such guidance to the Secretaries” of HHS and USDA. When an agency intends to propose “dietary guidance,” the Secretaries of HHS and USDA must “assure that the guidance either is consistent with the ‘Dietary Guidelines for Americans’ or that the guidance is

based on medical or new scientific knowledge which is determined to be valid by the Secretaries.” Critically, if either Secretary finds that the new guidance is *not* consistent with the Dietary Guidelines, it must be published in the Federal Register and submitted for public comment. If the Secretaries choose to approve the new guidance, despite its inconsistency with the Dietary Guidelines, they must provide “an explanation of the basis and purpose for the final guidance which addresses significant and substantive comments as determined by the proposing agency.”

The IWG proposal is neither consistent with the Dietary Guidelines nor based on medical or new scientific knowledge validated by the Secretaries. Nor has the proposal been published in the Federal Register for public comment. Thus, we believe the IWG proposal conflicts with the NNMRRRA.

#### **No Causal Link Has Been Found Between Food Advertising and Childhood Obesity**

The Institute of Medicine (IOM), an independent organization of experts, at the direction of the Congress, carried out a comprehensive analysis of food advertising and means to combat obesity in 2005. The IOM concluded in that report that they could not find a causal link between advertising and adiposity. According to the authors, the report, entitled *Food Marketing to Children and Youth: Threat or Opportunity*, was based on a thorough and impartial review of existing scientific data.

The IOM report concluded: “the current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity.” (*IOM 2005 Report*, 8-9) The IOM also found that the data, while “weak,” suggested that for teenagers advertising not only did not drive their food choices but was negatively associated with these choices. In other words, teenagers’ obesity issues were not being fueled by advertising. Therefore, there is absolutely no scientific basis for limiting ads to children aged 12 to 17, and the IWG proposal flies in the face of the IOM findings without presenting any evidence to support their proposals in this regard.

One of the authors of the IOM report, J. Howard Beales, recently conducted a further, careful review of the literature that has been published since the IOM report. Beales is a Professor of Economics and Business at George Washington University, and he is the former head of the FTC’s Bureau of Competition. He concluded: “the state of the evidence concerning the relationship between television advertising and childhood adiposity remains much as it was at the time of the IOM report (Beales, 38).” Beales concluded that there was no scientific basis for ascribing obesity trends to food or beverage advertisers and that the few studies that have attempted to draw a connection between food advertising and obesity have serious methodological flaws. The paper, entitled: “Television Advertising and Childhood Obesity” (October 2010), is available at [http://www.gmaonline.org/file-manager/Health\\_Nutrition/Beales-Review-of-Recent-Studies.pdf](http://www.gmaonline.org/file-manager/Health_Nutrition/Beales-Review-of-Recent-Studies.pdf).

Todd Zywicki, Foundation Professor of Law at George Mason University School of Law and former Director of the Office of Policy Planning at the FTC, also has conducted a comprehensive review of existing literature on the causes of rising obesity rates, including the possible contribution of advertising to the obesity problem. In his paper, “Obesity and Advertising Policy,” Professor Zywicki concluded:

“Based on our review of the evidence and economic theory, we believe that a host of factors have contributed to the increased rate of obesity in the American population. Our review of the available evidence does not indicate that food marketing to children has grown markedly during the years that children’s obesity has increased. **Thus, it seems that food advertising is not a primary causal factor in children’s increased obesity rate.** Furthermore, there may be negative consequences to banning or restricting truthful food advertising. As the public becomes more educated on the importance of weight control to health, there may be increased pressure on marketers to compete on calorie content; food ad restrictions could inhibit such competition (Zywicki, *Obesity and Advertising Policy*, <http://mason.gmu.edu/~tzywick2/GMU%20Article.pdf>, 1011).” (Emphasis added)

### **Food and Beverage Advertising Has Declined While Obesity Rates Grew**

Many critics of food marketing allege that children are “bombarded” by an ever-increasing number of food commercials leading to increased obesity rates. Unfortunately, some of the reports of these advocates have been based on assumptions and assertions rather than

scientific data and analysis. In fact, food and beverage marketers are spending less in real dollars on TV advertising and children under 12 are seeing far fewer TV commercials for food products during children's programming.

Beginning in 2004, ANA and the Grocery Manufacturers Association (GMA) have commissioned a series of studies of Nielsen Media Research data to quantify food advertising expenditures and exposures. The latest survey, which was carried out by Georgetown Economic Services and was released on April 28, 2011, found that **the average number of food and beverage ads that children 2 to 11 viewed on children's programming fell by 50% between 2004 and 2010.**

There was also a dramatic change in the composition of food and beverage ads viewed: ads for cookies fell by 99%; ads for soft drinks fell by 96% and ads for candy fell by 68%. More information about the most recent study is available at: [www.gmaonline.org/news-events/newsroom/new-research-shows-dramatic-changes-in-food-and-beverage-ads-viewed-by-chil/](http://www.gmaonline.org/news-events/newsroom/new-research-shows-dramatic-changes-in-food-and-beverage-ads-viewed-by-chil/).

Our first survey of the Nielsen data focused on ad expenditures and exposures for the period from 1993 to 2003. This ten-year period has been cited as the time during which obesity rates grew the most and at the highest rate and is, therefore, of particular interest.

The data again was analyzed by Georgetown Economic Services, LLC and the study drew the following conclusions:

- Adjusting for inflation in order to hold the value of dollars constant, real expenditures on food and restaurant advertising on all television, including cable, fell over the ten-year period from 1993 to 2003. In 1994, ad spending in these categories reached \$5.92 billion. In 2003, ad spending in these categories had dropped to \$4.98 billion. This was a 13% drop from the first four years of the period to the last four years.
- Rather than being increasingly bombarded by restaurant and food ads, children under 12 in fact saw fewer ads on TV in these categories between 1993 and 2003. The Nielsen data showed that the number of food and restaurant ads reached 5,909 per year in 1994 but dropped to 5,038 in 2003.

In July 2008, the FTC released its long-awaited report on food/beverage ad spending in all media. The report found that the total amount spent on food and beverage advertising to children aged 2-17 in 2006 was \$1.6 billion, covering an extremely broad range of media and marketing activities. This figure is significantly lower than the \$10 to \$12 billion dollar figure that was cited in the 2004 Institute of Medicine (IOM) Report on marketing to children and by several industry critics. This finding once again emphasizes the need to carefully develop a childhood obesity agenda based on fact, not on unsupported conjecture no matter how often those conjectures are repeated.

The Nielsen numbers and the FTC report clearly refute those advocates who claim that children are being increasingly bombarded by TV ads for foods, beverages and restaurants. It is also

important to note that advertising for these products is not a new phenomenon for parents or children. There have been substantial amounts of television commercials for food and beverage products and restaurants since the beginning of television, long before the recent increase in childhood obesity rates.

Unfortunately, the IWG analysis, as noted, utilized old data from 2006 or earlier that failed to capture these dramatic changes in the food marketing environment.

### **Restricting Food Advertising Will Not Combat Obesity**

There also is strong reason to believe that governmental manipulation of food marketing will not effectively combat obesity and therefore cannot be justified on a cost benefit basis.

In a number of countries, there are broad restrictions on food advertising. In fact, in Sweden and the Canadian province of Quebec, broad across-the-board bans on advertising to children have been imposed. Recent analysis of these bans, however, suggests that they have had minimal, if any, impact on obesity levels. Additionally, in the Netherlands and certain other European countries, where there are no ad restrictions and relatively high levels of food advertising, obesity levels are lower than in either Quebec or Sweden.

Furthermore, in the United States, the amount of advertising for food products is relatively uniform across this nation. Television viewers in Jackson, Mississippi see most of the same commercials for foods and beverages that are seen by viewers in Boulder, Colorado. Yet there

are significant differences in obesity levels across the country for both adults and children, even in closely contiguous areas. CDC numbers from 2007 indicated that 9.6% of children in Oregon were obese, while in Mississippi the rate was 21.9%. Utah's rate was 11.4% while Georgia's was 21.3%.

According to 2009 figures from the Centers for Disease Control and Prevention, the state with the lowest rate of obesity was Colorado, at 18.6%. By contrast, the rate of obesity was 31.4% in Oklahoma, 28.1% in Kansas and 27.2% in Nebraska. Eight other states (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Tennessee and West Virginia) had obesity rates equal to or greater than 30% (<http://www.cdc.gov/obesity/data/trends.html>). These kinds of findings demonstrate that there clearly are major issues at work on childhood and adult obesity that far transcend the impacts of advertizing.

As we will discuss further, these findings directly relate to the constitutional burdens that the government faces in restricting food advertising directed to children.

### **Food Advertising Has Substantial First Amendment Protection**

Speech enjoys a uniquely favored status in democratic culture and in free markets. The whole trend of First Amendment law, since the mid-1970's, has been to provide greater protection to commercial speech. At that time, the U.S. Supreme Court recognized that a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener

by far, than his interest in the day's most urgent political debate." *Virginia Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 763 (1976).

Over the next thirty years, the Supreme Court has repeatedly strengthened the protections that commercial speech enjoys under the First Amendment. In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. Writing for the majority, Justice O'Connor enunciated the clearest expression of the Supreme Court to date concerning the constitutional limits on restricting advertising: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."

The *Western States* case makes clear that the First Amendment should not be perceived as merely a defense against government overreaching in regard to speech regulation in general or advertising restrictions in particular. Instead, it sets up clear parameters for government policy formation. *Western States* commands that consistent with the First Amendment, non-speech restrictive options need to be examined and found inadequate before speech restrictive options can be legitimately turned to for consideration.

The government has not come close to examining, let alone exhausting, all of the non-speech options that can be taken to directly address childhood obesity. We believe the marketing restrictions contained in the IWG proposal if imposed would clearly violate the First Amendment rights of marketers to speak about their legal products and the First Amendment

rights of both parents and children to receive important information about these legal products.

The Supreme Court has made it clear that truthful, non-deceptive commercial speech cannot be banned or restricted unless the restriction “directly and materially advances” a “substantial governmental interest” and is “narrowly tailored” to “reasonably fit” that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech also must be “no more extensive than necessary.” *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001). Also, the burden of proof concerning all of these issues must be met by the government. *Edenfield v Fane*, 507 U.S. 761 (1993).

Given the complex and multifaceted causes of obesity and the welter of inconsistent studies on the role of advertising and media, with the most comprehensive IOM study not able to find a causal connection between advertising and obesity, we do not believe that bans or restrictions on food or beverage advertising aimed at children could possibly meet the stringent *Central Hudson* test.

Given this multitude of facts, it is highly unlikely that banning or restricting food advertising would directly and materially advance the government’s interest in protecting the health of children.

In addition, it would be very difficult to craft a “narrowly tailored” restriction on advertising to children that is no more extensive than necessary. As noted above, the IWG’s marketing proposals would restrict advertising in measured media when the percentage of children in the audience reaches 30% for children 2-11 and 20% for children from 12-17. That means that companies would be precluded from marketing in media where the audience consists of 70% or 80% adults. The U.S Supreme Court has consistently refused to allow a “child protection” rationale to justify blocking information from reaching adults. In *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court noted that communication in society cannot be lowered to the level of the sandbox under the guise of protecting children.

The Supreme Court reaffirmed this important principle earlier this year. In *Brown v. Entertainment Merchants Association*, No. 08-1448, announced on June 27<sup>th</sup>, the Court struck down a California law that restricted the sale or rental of violent video games to minors, holding that the law violates the First Amendment.

Writing for the majority in the case, Justice Scalia stated: “No doubt a State possesses legitimate power to protect children from harm, (citations omitted), but that does not include a free-floating power to restrict the ideas to which children may be exposed.” 564 U.S. \_\_\_\_ (2011) (Slip Opinion at 7).” Justice Scalia concluded: “California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors . . . Even where the protection of children is the object, the constitutional limits on governmental action apply.” 564 U.S. \_\_\_\_ (2011), (Slip Opinion at 17).

Can it be conceived that violent video game advertising, however gory and graphic, must receive First Amendment protection for kids under 18, but food products that can be labeled “healthy” under FDA regulations could constitutionally face government efforts to have them withdrawn from the media and other marketing venues?

As noted above, the very broad definitions of marketing included in the IWG proposal have the effect of sweeping in much programming and advertising that is intended for adults. The IWG may genuinely believe that restricting these messages about certain food products may protect children. Nevertheless, it is highly unlikely that the courts would uphold a government effort to protect children from food advertising. As Professor Redish noted in his “White Paper:”

“Indeed, in the last fifteen years the Supreme Court has invalidated all governmental regulations of commercial advertising to have come before it, always on the grounds that those regulations violate the First Amendment right of free expression” (*Redish*, 1). There is no reason to believe the Court would uphold the sweeping proposed marketing restrictions that are the fundamental foundation of the IWG proposal.

Indeed, another Supreme Court decision announced this year demonstrates the constitutional defects of efforts by the government to impose content-based burdens on speech, such as those in the IWG proposal. In *Sorrell v. IMS Health, Inc.*, No. 10-779, which was announced on June 23<sup>rd</sup>, the Court struck down a Vermont law that restricted the use of prescriber histories for purposes of marketing pharmaceutical products to physicians. Writing for the majority,

Justice Kennedy stated: “Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech. (citations omitted) ‘The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.’ 564 U.S. \_\_\_\_ (2011) (Slip Opinion, 22).”

In striking down the Vermont law which banned pharmaceutical marketing, the Court stated that the government cannot burden the speech of others in order to tilt public debate in a preferred direction: “Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” 564 U.S. \_\_\_\_ (2011) (Slip Opinion, 22).

Much like the effort of the Vermont Legislature to restrict speech it did not like, the exact same reasoning applies to the IWG proposals. The IWG seeks to restrict truthful speech about products that are disfavored: (1) because they do not meet the extraordinarily restrictive and burdensome nutrition standards proposed by the Working Group; (2) because they believe the food advertising children see is “too persuasive;” and (3) because they do not trust the ability of children and parents to use the commercial information they see “appropriately.” The marketing restrictions in the IWG proposal are clearly content-based burdens on speech, and as

pointed out earlier, are not “voluntary.” Therefore, they do not pass constitutional muster. And they certainly cannot, in light of the lack of scientific analysis and evidence to support the IWG’s proposed sweeping restrictions on speech, be constitutionally upheld. In a period where the Supreme Court has built stronger fortifications against government’s direct restrictions of commercial speech, we should become particularly wary of efforts to avoid these restrictions through indirect government censorship.

### **Déjà Vu All Over Again**

The FTC’s own history and experience should be a beacon to guide us in regard to these critical speech issues. The FTC has wrestled in detail with the constitutional issues surrounding food marketing and children’s advertising before. Back in 1978, the FTC launched a rulemaking to consider whether to ban all children’s food advertising. After three years of review, more than sixty thousand pages of written comments and six thousand pages of hearing transcript, much of it focusing on constitutional issues, the Commission staff recommended termination of the rulemaking. The staff found that there did not appear “to be workable solutions which the Commission can implement through rulemaking in response to the problems articulated during the course of the proceeding.” FTC Final Staff Report and Recommendation, March 31, 1981 at 13.

In 2004, Howard Beales, then the Director of the Bureau of Competition, reviewed this history in detail in a paper entitled, “Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present (<http://www.ftc.gov/speeches/beales/040802adstokids.pdf>).” Beales, after

a careful analysis of the constitutional and policy issues, forcefully stated: “Based on the history of FTC regulation of children’s advertising experience with the prior Kidvid rulemaking and the current state of the law, one can only conclude that restricting truthful advertising is not the way to address the health concerns regarding obesity (Beales, 18).”

### **Conclusion: Look for Solutions That Work and Respond to Congressional Mandates**

The advertising community, the media community and food, beverage and restaurant companies already have voluntarily spent billions of dollars in various efforts to address the childhood obesity challenge. These steps substantially exceed the efforts of any other sector of our society, including the government.

We intend to continue these efforts forcefully, as they are being carried out in response to continuing market demand from consumers. We also stand ready to respond to government requests when they are reasonable, scientifically-based and likely to be effective in reducing obesity rates. The current IWG proposal falls far short of those criteria.

For some time now there have been suggestions, rumors and even recently specific statements from the IWG that the Working Group “anticipates making significant changes to both the marketing and nutrition principles as it develops final recommendations as required by Congress.” This is a positive signal that the IWG has begun to realize some of the serious flaws of their proposal. **However, no proposal should come forward to the Congress, whatever its new dimensions, unless that proposal can (1) be justified through the best science and on a**

cost/ benefit basis; and (2) specifically respond to the requests of the Congress in regard to the relationship of the nutrition and marketing standards to preventing obesity in the United States.

ANA and the rest of the advertising community stand ready to work with the IWG and all other groups in society to combat obesity impacting young people and the population at large. However, we must do so carefully, systematically, scientifically and within the parameters of the First Amendment.

We therefore urge the Interagency Working Group to formally withdraw their proposal on food marketed to children and carefully analyze and reevaluate their numerous proposals to focus on real solutions that work.

ANA is the advertising industry's premier trade association dedicated exclusively to marketing and brand building. We represent more than 400 companies with over 9,500 brands that collectively spend more than \$250 billion annually in marketing communications and advertising. Many of America's largest food and beverage companies and restaurants are members of ANA, although we represent virtually every segment and sector of the advertising community. More information about our association is available at [www.ana.net](http://www.ana.net)